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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 444

BAGGETT TRANSPORTATION COMPANY,
Petitioner,

v.

HUGHES TRANSPORTATION, INC., and INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on April 30, 1968.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 15-28) is reported at 393 F. 2d 710. The opinion of the District Court (Appendix B, *infra*, pp. 29-36), is not reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 30, 1968 (App. R. 15).[1] A petition for rehearing (App. R. 17-21) was denied on May 28, 1968 (App. R. 22). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

Whether in a private enforcement action under § 222 (b) (2) of a district court without jurisdiction to review the validity of an order of the Interstate Commerce Commission may hold a motor carrier bound by the Commission's order despite the prior pendency before a three-judge court of the carrier's action to judicially review and set aside the Commission's order.

STATUTES INVOLVED.

The statutory provisions involved are § 222 (b) (2) and (3) of Part II of the Interstate Commerce Act, 79 Stat. 649, 49 U. S. C., § 322 (b) (2) and (3); § 205 (g) and (h) of Part II of the Interstate Commerce Act, 49 Stat. 548, as amended, 49 U. S. C., § 305 (g) and (h); § 17 (9) of Part I of the Interstate Commerce Act, 24 Stat. 385, as amended, 49 U. S. C., § 17 (9). They are set forth in Appendix C, *infra*, pp. 37-39.

STATEMENT.

On May 10, 1966, Tri-State Motor Transit Company ("Tri-State") instituted in the District Court for the Western District of Missouri a civil action (Hughes S. R.

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[1] Citation to the record of proceedings in the Court of Appeals will be designated as "App. R."; citations to the original record of proceedings in the District Court will be designated "R"; citations to the supplemental records of proceedings in the District Court will be designated "S. R."

3-6) under § 222 (b) (2) of the Interstate Commerce Act to enjoin Baggett Transportation Company ("Baggett") from the performance of transportation services alleged to be in violation of a restriction in Baggett's motor carrier certificate issued by the Interstate Commerce Commission.[2] Upon its commencement the Interstate Commerce Commission ("Commission") filed in Tri-State's action a notice pursuant to § 222 (b) (3) that it was considering the same matter in a proceeding before the Commission, whereupon the Tri-State action was stayed as required by that paragraph of the statute.[3] The Commission, acting on its own motion (R. 97-99), then instituted proceedings in the Commission for investigation of the same matters complained of in Tri-State's action, and both Tri-State and its wholly owned subsidiary, Hughes Transportation, Inc. ("Hughes"), intervened in that proceeding in support of the Commission (R. 5). The Commission on September 8, 1967, rendered an administrative decision (R. 4-12) interpreting Baggett's certificate restriction so as not to authorize performance of the transportation service complained of and issued a cease-and-desist order prohibiting Baggett from performing that service after November 8, 1968 (R. 11-12).

Baggett then instituted on October 31, 1967, in the United States District Court for the Northern District of Alabama an action under §§ 17 (9) and 205 (g) of the Inter-

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[2] Section 222 (b) (2), added by a 1965 amendment, authorizes "any person injured" by a "clear and patent violation" of the provisions of §§ 203 (c), 206, 209 or 211 of the Interstate Commerce Act to apply to a district court for an injunction against the violation.

[3] Paragraph (3) of § 222 (b), added at the same time, provides that in any action under paragraph (2) the Commission may notify the District Court that it intends to consider the matter in a proceeding before the Commission and that upon the filing of such a notice the District Court "shall stay" further action pending disposition of the proceeding before the Commission.

state Commerce Act and 28 U. S. C., §§ 2321-25 to have the Commission's order reviewed, set aside, and enjoined by a statutory three-judge court (R. 15-16, 119-20; Hughes S. R. 8-17). Baggett at the same time requested an order staying the effectiveness and enforcement of the Commission's order under 28 U. S. C., § 2324 which was heard by the Chief Judge of the Alabama district court on November 6, 1967, and taken under advisement. On November 8, 1967, the Missouri District Court heard a motion in the action by Tri-State, now joined by the Commission as intervening plaintiff, to set aside the stay entered under § 222 (b) (3) of the Interstate Commerce Act and for an injunction against Baggett in accordance with the Commission's administrative order (Baggett S. R. 1-2). At the conclusion of the hearing in the Tri-State case the Missouri District Judge concluded orally in open court that his court did not have jurisdiction to review the validity of the Commission order and decision and that only the Alabama District Court had jurisdiction to do so in the direct review action by Baggett; that if he did have jurisdiction of the entire case, including the review action, he would not "do anything to stop the I. C. C." cease-and-desist order from going into effect the next day; that he did not believe the Alabama court would stay the Commission's order but Baggett was "free to proceed at this time" in the Alabama court to review the Commission order and the Alabama court was "free to fully pursue the matter as it sees fit"; and that he would not grant at that time Tri-State's motion for injunction but was taking it under advisement.[4] Thereafter, on the same date, the Alabama District Court issued in Baggett's direct review action an order restraining the enforcement and effective-

[4] Although the Missouri District Judge's oral remarks in the Tri-State action are not a part of the records, they were quoted in full in the Commission's brief in the Court of Appeals and relied on by the Court of Appeals. They accordingly are set forth in Appendix D, *infra*, pp. 40-45.

ness of the Commission's cease-and-desist order pending its review (Hughes S. R. 18-23). The Missouri District Judge subsequently concluded that, by reason of the Commission's filing of the notice requiring a stay under § 222 (b) (3) of the Tri-State action, he could not issue an injunction in the Tri-State suit during the pendency of Baggett's direct review action in Alabama and that he therefore would take no further action in the Tri-State suit (R. 35, 37-38).

On December 15, 1967, respondent Hughes, which is Tri-State's subsidiary, commenced the present action under § 222 (b) (2) likewise seeking to enjoin Baggett from operating in alleged violation of the certificate restrictions as interpreted in the Commission's order and decision, which were attached to and incorporated in Hughes' complaint (R. 1-17). The Commission again intervened as a party plaintiff (R. 17-18) and requested the issuance of the injunction against Baggett (R. 76). Baggett moved to stay the action pending judicial review before the Alabama three-judge court of the validity of the Commission's administrative order. The Missouri District Court on January 8, 1968, rendered a memorandum opinion and order (R. 20-27) enjoining Baggett throughout the nation as prayed by respondents and in accord with the Commission order. The District Court's order was entered in accordance with its finding, which it recognized to have been intended by Congress as a jurisdictional standard (R. 21; Appendix B, *infra*, p. 29), that Baggett's operations were "clear and patent violations" of its certificate restriction; the only evidence before the District Court respecting the interpretation of the certificate was the Commission's decision and order (R. 53, 56).

The Court of Appeals affirmed, concluding that a private enforcement action under § 222 (b) (2) in which the

Commission joined as party plaintiff could proceed before determination in a direct review action of the validity of the Commission order. Although recognizing that the provision in paragraph (3) of § 222 (b) requiring stays upon notice that the Commission was considering the same matter was intended by Congress to permit questions within the Commission's primary jurisdiction to be removed from the district court, the Court of Appeals concluded that the matter nevertheless could be determined in the Hughes case despite the stay in the Tri-State action because the Commission had filed no such notice in the Hughes suit.

REASONS FOR GRANTING THE WRIT.

The case raises an important question in the administration of the 1965 amendments to § 222 (b) of the Interstate Commerce Act and the effect of those amendments on judicial review of orders of the Interstate Commerce Commission—whether a district court without jurisdiction to review the validity of a Commission order may hold a motor carrier to be bound by the Commission's order despite the prior pendency of the carrier's direct review action for determination of the order's validity. Since, regardless of the outcome of its action for judicial review of the Commission's order, the carrier is bound by the jurisdictional finding in the § 222 (b) (2) enforcement action of illegality in accord with that of the Commission's order, the holding of the Court of Appeals deprives the carrier of any review, certainly any meaningful review, of the Commission's order. The holding also creates a serious problem in judicial administration since it will permit competing carriers to institute independent enforcement actions in one or more other district courts whenever an action for direct review of a Commission order has been commenced. Moreover, in

view of the existence of similar private rights of action against other industries subject to regulation by federal agencies, this decision would have an application far beyond that of motor carriers.[5]

The only issue decided by the Commission in the investigation proceeding against Baggett was whether the restriction in Baggett's certificate permits the "tacking" of separate certificate authorities for a specific purpose. As noted in the opinion of the Court of Appeals, there had been no Commission decision of this issue prior to its informal non-binding opinion and its cease-and-desist order involved in the present controversy. The only substantive issue in the Alabama District Court action for review of the Commission's order is whether the Commission's interpretation of the certificate restriction is valid. That sole issue has now been decided as a jurisdictional finding by the Court of Appeals and the District Court in the present case.[6] By that decision and the

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[5] For example, the Federal Aviation Act of 1958, § 1007 (a), 49 U. S. C., § 1487 (a), permits "any party in interest" to apply to district courts for enforcement of the Act by injunction; Part I of the Interstate Commerce Act, §§ 8 and 9, 49 U. S. C., §§ 8 and 9, permits any person injured by a violation of law by a rail carrier to institute suit in a district court against the carrier; the Investment Company Act of 1940, § 44, 15 U. S. C., § 80a-43, permits suits in district courts to enjoin any violation of the Act; the Communications Act of 1934, § 401 (b), 47 U. S. C., § 401 (b), permits any party injured to apply to a district court for injunction and enforcement. Each of the above statutes also provides separately for procedures to review orders of the appropriate regulatory agency. In no case has it been suggested that a private party may enforce an administrative order or enjoin activities held illegal by an administrative order pending judicial review of the order. Yet the rationale of the Court of Appeals in the present case would have equal application under those statutes.

[6] As stated in the conference report accompanying the 1965 Amendments to § 222 (b), "The conferees wish to emphasize that the words 'clear and patent' in the Amendments . . . are intended as a standard of jurisdiction rather than a measure of the required burden of proof and that the district courts

nationwide injunction entered accordingly, Baggett is and will be compelled to conform its service to the Commission's decision and order regardless of the validity of that order as determined by the three-judge direct review court in Alabama. Since, as the Missouri District Court itself held (Appendix D, *infra*), only the Alabama District Court has jurisdiction and venue to determine the validity of such an order accompanied by a cease-and-desist order,[7] the result is that Baggett is held conclusively bound by the Commission's order without an opportunity for judicial review. And if the threshold jurisdictional determination by the courts below, in accord with that of the Commission proceeding, of the interpretation of Baggett's certificate and the legality of its operations is left intact by this Court, the only issue pending in the Alabama direct review court will be mooted.

The holding of the Court of Appeals is directly contrary to this Court's decision in *Pennsylvania R. R. v. United States*, 363 U. S. 202.[8] In *Pennsylvania* the Court of Claims likewise refused to suspend, pending judicial review in a Pennsylvania District Court of a Commission

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of the United States should entertain only those actions under these sections, as amended, which involve clear and patent attempts to circumvent regulation in the areas involved."

Although the Court of Appeals approaches this case as turning on the traditional discretion of a district judge in issuing a preliminary injunction, it is clear that the District Court's substantive determination of illegality of Baggett's operations, being a jurisdictional finding, does not invoke that discretion.

[7] Sections 205 (g) and (h) of Part II of the Interstate Commerce Act, 49 U. S. C., § 205 (g) and (h) (Appendix C, *infra*); § 17 (9) of Part I of the Interstate Commerce Act, 49 U. S. C., § 17 (9), 49 U. S. C., § 17 (9) (Appendix C, *infra*); 28 U. S. C., §§ 2321-25, 1336, and 1398. See **Interstate Commerce Commission v. Atlantic Coast Line R. R.**, 383 U. S. 576, 586-87, 596-97.

[8] The **Pennsylvania** decision was argued to, but not mentioned in the opinions of, both the Court of Appeals (see App. R. 18) and the District Court (R. 40-41).

decision regarding freight rates, an action for recovery of freight charges and entered a judgment which accorded with the Commission's decision. Observing that, as here, "[t]he result is that the Railroad has been held bound by the Commission's order although completely denied any judicial review of that order" (363 U. S. at 204), this Court reversed the judgment of the Court of Claims because (*id.*, at 205-06),

> "since the Railroad had a right to have the Commission's order reviewed, and only the [Pennsylvania] District Court had the jurisdiction to review it, the Court of Claims was under a duty to stay its proceedings pending this review."

See also **Interstate Commerce Commission v. Atlantic Coast Line R. R.**, *supra*, 383 U. S. at 589-90, 599-600, 602; **Far East Conference v. United States**, 342 U. S. 570, 576-77.

There is nothing in § 222 (b) or its legislative history remotely suggesting any intention to create a change in these established principles either by affecting a party's right to have the validity of a Commission order adjudicated before he is held bound by it or by permitting a district court in a § 222 (b) (2) action to determine the order's validity. On the contrary, it is quite clear that Congress' provision in paragraph (3) of § 222 (b) was precisely for the purpose of preventing the decision of such issues in a § 222 (b) (2) action.

Not only was it repeatedly remarked by the congressional sponsors of the bill that it was intended under the amendments that the Commission would retain "its jurisdiction to interpret or construe permits or rules and regulations issued by the Commission"[9] and indeed that

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[9] House Report No. 523 (Interstate and Foreign Commerce Committee), 1965 U. S. Code Congressional and Administrative News, p. 2931; 111 Cong. Rec. 9677 (Representative Oren Harris, principal house sponsor).

"[t]he purpose of the bill is to prevent **uncertified** carriers . . . from infringing on the business of certified carriers"[10] rather than to permit interpretation of certificates, but it was for the precise purpose of preventing the decision of such issues in suits under § 222 (b) (2) that the provisions in paragraph (3) for mandatory stays was inserted. (See, *e. g.*, 111 Cong. Rec. 16159, 9677, 9679, 9680.) As remarked by Senator Lausche (111 Cong. Rec. 16159):

> "In order to insure that the courts could not be used to decide initially cases involving important issues of transportation law or policy, the committee ordered an amendment [adding ¶ (3) of § 222 (b)]."

And, Senator Lausche stated, upon the filing of a notice under paragraph (3) so as to require a stay, the matter was then to be "handled in the normal processes," which clearly would include the usual opportunity for judicial review of the Commission order entered following the stay.

Paradoxically, both the Court of Appeals and the District Court recognized that the provision in § 222 (b) (3) was intended to require the continuation of the stay until completion of judicial review of the resultant Commission order. Thus, the District Judge concluded, after personally consulting with Representative (now District Judge) Oren Harris, that the stay under paragraph (3) precluded any action in the **Tri-State** suit until completion of judicial review in the Alabama court (R. 35, 37-38). But the District Judge was evidently of the view that the congressional purpose in requiring a stay upon consideration of the matter by the Commission was not applicable to the present suit, involving the identical issue, by Tri-State's subsidiary simply because the Commission had

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[10] 111 Cong. Rec. 16159 (Sen. Lausche, principal sponsor in the Senate).

declined to file a formal notice in Hughes' action.[11] The Court of Appeals adopted the same reasoning. While recognizing the purpose of the stay entered in the Tri-State suit it concluded that "a literal reading" of the statute did not require that the Hughes suit, as well as the Tri-State action, be stayed pending judicial review since "the ICC has not filed for a stay" in the **Hughes** suit. It is submitted that such an anomolous result, even if permitted by a "literal reading" of the statute and though urged by the Commission, is hardly consistent with any Congressional purpose in requiring a stay through its insertion of paragraph (3) in the Act. Indeed the literal reading of the Court of Appeals would permit Tri-State itself, or any other carrier in whose action a notice under paragraph (3) has been filed, to avoid the Congressional intent simply by instituting a new suit.

The Court of Appeals concluded that the statutory creation of a private right of action and jurisdiction in a

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[11] The Court thus stated in the hearing on the present case (R. 37-38):

> "And this case doesn't come to me in the posture as case Number 2000, with the I. C. C. having asked me in effect or staying any further action until the I. C. C. acted. That is the first thing I asked Mr. Horak, was whether I. C. C. would be doing that in this case. And he said no. So I get this case, filed on behalf of a separate legal entity, so far as I can tell, and with the distinction that the I. C. C. has not asked any stay of proceedings.
>
> "Now, how, therefore, does this fall into the same pattern as the other case? Because in the other case a stay order under the statute remains until the conclusion of the Commission proceeding, and the fault in that case is when is the Commission hearing concluded? Is it concluded when there is a stay order issued by a federal judge who has convened a three-judge court, or is about to convene a three-judge court under a petition for review of the I. C. C. order? Or is it completed when the Commission has completed its hearing and entered its first order and it later is up for review? That is what is the real fault in that case, is what Congress meant by that language. Now, I don't have that consideration in this case, do I?"

district court of such an action alone permits a court to determine the same issue involved in a Commission order for which judicial review is pending. But that view is contrary to this Court's conclusions in its interpretation of other similar statutes which likewise create private enforcement actions. For instance, a shipper which does not participate in a Commission proceeding by another shipper under § 13 (1) of the Interstate Commerce Act, but instead institutes an original action in a district court under §§ 8 and 9 of the Interstate Commerce Act against the carrier,[12] is nevertheless required, as this Court observed in **Interstate Commerce Commission v. Atlantic Coast Line Railroad**, supra, 383 U. S. at 600, "to await the outcome of litigation over the validity of the Commission order" rendered in the § 13 (1) proceeding. It has never before been even suggested that a court without jurisdiction to review a Commission order may proceed to adjudication despite the pendency in another court of a direct review action.[13]

The District Court indicated that, rather than basing its decision on the Commission order (which clearly would be contrary to **Pennsylvania R. R. v. United States**, supra), it was interpreting Baggett's certificate and reaching its

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[12] §§ 8 and 9 of the Interstate Commerce Act, like § 222 (b) (2), permit suits against a carrier by any "person or persons injured" by "any act, matter or thing in this chapter prohibited or declared to be unlawful."

[13] As also observed in this connection in **Interstate Commerce Commission v. Atlantic Coastline Railroad**, *supra*, 383 U. S. at 589-90:

> "A threshold question is raised by respondents' contention that the statutory violation issue is not open to review in a § 16 (2) enforcement action, the Commission's finding being conclusive on the enforcement court unless set aside in a § 17 (9) proceeding. If respondents are correct on this point, their § 17 (9) action must be allowed under even the Commission's interpretation of **United States v. Interstate Commerce Comm.**, 337 U. S. 426, and **Pennsylvania R. Co. v. United States**, 363 U. S. 202."

decision of illegality independently of the Commission's decision of the same matter (R. 20). Such a result, if permitted, plainly would be inconsistent with the congressional purpose in requiring a stay under paragraph 3 when the Commission undertakes to decide the matter in exercise of its primary jurisdiction since "[o]f course a preliminary determination by the Commission would have little effect in achieving uniformity if its determination were subject to de novo review" (**Interstate Commerce Commission v. Atlantic Coast Line R. R.**, *supra*, 383 U. S. at 592), let alone an entirely independent district court determination made without regard to the Commission's decision.

The holding of the court of appeals also has the subsidiary, albeit serious, effect of permitting a district court in a § 222 (b) (2) action to collaterally nullify the power of the direct review court under 28 U. S. C., § 2324 to suspend the operation and enforcement of a Commission cease-and-desist order pending judicial determination of its validity.[14] The injunction in this case against Baggett—which has precisely the same scope and effect as the Commission's cease-and-desist order—did nullify the Alabama direct review court's prior order restraining the effectiveness and enforcement of the Commission's order. Section 222 (b) (2) and its legislative history are devoid of any indication that Congress even anticipated, much less intended, that it could be utilized, as the court of appeals holds, to nullify the reviewing court's statutory and inherent power to suspend the operation of a Commission order. Yet, as this Court observed in **Scripps-Howard Radio v. FCC**, *supra*, the power of the reviewing court to grant a stay is such a part of judicial review that

[14] The power of the reviewing court to stay an agency decision to preserve the status quo pending review is indeed so basic that it exists irrespective of the absence of specific statutory authorization. **Scripps-Howard Radio v. F. C. C.**, 316 U. S. 4, 9-11.

Congress will not be assumed to have intended its denial "without clearly expressing such a purpose." And since both the Commission and Hughes[15] could have applied to the Alabama court for the vacation of the suspension of the Commission's order, which neither party attempted, the collateral avoidance of the Alabama district court's order was not even necessary to the protection of the respondents.[16]

CONCLUSION.

The petition for a writ of certiorari should be granted.

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[15] Which, by reason of its participation in the Commission proceeding, had an absolute right under 28 U. S. C., § 2323 to intervene in the review action.

[16] Illustrative of the many ramifications of the decision of the court of appeals, moreover, the Commission has been permitted to violate the reviewing court's order against enforcement of the Commission's order through its participation in its enforcement in the present case, but the reviewing court is powerless to protect its orders and jurisdiction without precipitating unseemly conflicts between the orders of the two courts.